1989

Boyd A. Ward v. Richfield City : Brief in Opposition to Certiorari

Utah Supreme Court

George E. Brown, Jr.; Attorney for Petitioner.
Ken Chamberlain; Olsen, McIff, and Chamberlain; Attorneys for Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * * * * *

BOYD WARD, Petitioner, -vs- RICHFIELD CITY, a municipal corporation; et al., Respondents.	CASE NO. 890347 Court of Appeals No. 880713-CA Priority 13

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BRIEF OPPOSING PETITION FOR CERTIORARI TO UTAH COURT OF APPEALS

* *

Appeal from the Decision of the
Utah Court of Appeals

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LIST OF PARTIES

PETITIONER

Boyd A. Ward

RESPONDENTS

1. Richfield City, a municipal corporation;

2. Richfield City Council, a political subdivision of the State of Utah;

3. Kendrick Harward, individually and in his official capacity as Mayor of Richfield City and as a member of the Richfield City Council;

4. Glen Ogden, individually and in his official capacity as a member of the Richfield City Council;

5. Kay Kimball, individually and in his official capacity as a member of the Richfield City Council;

6. Rex Warenski, individually and in his official capacity as a member of the Richfield City Council;

7. Duane Wilson, individually and in his official capacity as a member of the Richfield City Council;

8. Nad Brown, individually and in his official capacity as a member of the Richfield City Council;

9. Woody Farnsworth, individually and in his official capacity as a member of the Richfield City Council; and

10. Does I through V.

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * * * * *

BOYD WARD, Petitioner, -vs- RICHFIELD CITY, a municipal corporation; RICHFIELD CITY COUNCIL, a political subdivision of the State of Utah; KENDRICK HARWARD, individually and in his capacity as Mayor of Richfield City and as a member of the Richfield City Council; GLEN OGDEN, individually and in his official capacity as a member of the Richfield City Council; KAY KIMBALL, individually and in his official capacity as a member of the Richfield City Council; REX WARENSKI, individually and in his official capacity as a member of the Richfield City Council; DUANE WILSON, individually and in his official capacity as a member of the Richfield City Council; NAD BROWN, individually and in official capacity as a member of the Richfield City Council; WOODY FARNSWORTH, individually and in his official capacity as a member of the Richfield City Council; and DOES I through V, Respondents.	BRIEF OPPOSING PETITION FOR CERTIORARI TO UTAH COURT OF APPEALS CASE NO. 890347 Court of Appeals No. 880713-CA Priority No. 13

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CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 43 (1) through (4) of the Utah Supreme Court, attached hereto as Appendix p. ii.

Rule 43. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with the decision of this court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this court.

(Added, effective April 20, 1987.)

Title 52, Chapter 4, Utah Code Annotated, 1953 as amended (Open and Public Meeting Act):

***

52-4-3. Meetings open to the public - Exceptions.

Every meeting is open to the public unless closed pursuant to Sections 52-4-4 and 52-4-5.

***

52-4-6. Public notice of meetings.

(1) Any public body which holds regular meetings that are scheduled in advance over the course of a year shall give public notice at least once each year of its annual meeting schedule as provided in this section. The public notice shall specify the date, time, and place of such meetings.

(2) In addition to the notice requirements of Subsection (1) of this section, each public body shall give not less than 24 hours' public notice of the agenda, date, time and place of each of its meetings.

(3) Public notice shall be satisfied by:

(a) posting written notice at the principal office of the public body, or if no such office exists, at the building where the meeting is to be held; and

(b) providing notice to at least one newspaper of general circulation within the geographic jurisdiction of the public body, or to a local media correspondent.

(4) When because of unforeseen circumstances it is necessary for a public body to hold an emergency meeting to consider matters of an emergency or urgent nature, the notice requirements of Section 52-4-6(2) may be disregarded and the best notice practicable given. No such emergency meeting of a public body shall be held unless an attempt has been made to notify all of its members and a majority votes in the affirmative to hold the meeting.

***

52-4-8. Suit to void final action - Limitation-Exceptions.
Any final action taken in violation of Sections 52-4-3 and 52-4-6 is voidable by a court of competent jurisdiction. Suit to void final action shall be commenced within 90 days after the action except that with respect to any final action concerning the issuance of bonds, notes, or other evidences of indebtedness suit shall be commenced within 30 days after the action.

***

Title 42, 1983, U. S. Code (Civil Rights Act):

1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. 1979; Dec. 29, 1979, P.L. 96-170, 1, 93 Stat. 1284.)

Laws of Utah 1987, Chapter 207:

AN ACT RELATING TO CITIES AND TOWNS; DEFINING THE POWERS OF CITIES AND TOWNS TO APPOINT AND REMOVE PUBLIC SAFETY DEPARTMENT HEAD; DEFINING WHEN A PUBLIC SAFETY DEPARTMENT HEAD MAY DISCIPLINE A SUBORDINATE; AND MAKING TECHNICAL CORRECTIONS.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS: 10-3-916, AS LAST AMENDED BY THE CHAPTER 33, LAWS OF UTAH 1983

REPEALS: 10-3-911, AS ENACTED BY CHAPTER 48, LAWS OF UTAH 1977

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Amended.

Section 10-3-916, Utah Code Annotated 1953, as last amended by Chapter 33, Laws of Utah 1983, is amended to read:

10-3-916. Recorder, treasurer, marshal in cities of third class and towns.

(1) In each city of the third class and town, on or before the first Monday in February following a municipal election, the mayor, with the advice and consent of the city council, shall appoint a qualified person to each of the offices of city recorder [~~,~~] and treasurer [~~, and marshall~~].

(2) The city recorder [~~shall be~~] is ex officio the city auditor and shall perform the duties of [~~such~~] that office.

(3) The mayor, with the advice and consent of the council, may also appoint and fill vacancies in all [~~such officers and agents as may be~~] offices provided for by law or ordinance[~~, except as otherwise provided by law~~].

(4) All appointed officers shall continue in office until their successors are appointed and qualified.

Section 2. Section Repealed.

Section 10-3-911, Utah Code Annotated 1953, as enacted by Chapter 48, Laws of Utah 1977, is repealed.

Section 10-3-911, Utah Code Annotated, 1953 as amended:

10-3-911. Repealed.

Section 10-3-916, Utah Code Annotated, 1953 as amended:

10-3-916. Appointment of recorder and treasurer in cities of third class and towns - Vacancies in office.

(1) In each city of the third class and town, on or before the first Monday in February following a municipal election, the mayor, with the advice and consent of the city council, shall appoint a qualified person to each of the offices of city recorder and treasurer.

(2) The city recorder is ex officio the city auditor and shall perform the duties of that office.

(3) The mayor, with the advice and consent of the council, may also appoint and fill vacancies in all offices provided for by law or ordinance.

(4) All appointed officers shall continue in office until their successors are appointed and qualified.

Hutchison vs. Cartwright, 692 P.2d 772-774 (Utah 1984), attache hereto as Appendix pp. iii.1 through iii.3.

Rice vs. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (Iowa 1955), attached hereto as Appendix pp. iv.1 through iv.7.

Southern Pacific vs. Industrial Commission, 91 P.2d 700 (Arizona 1939), attached hereto as Appendix pp. v.1 through v.6.

STATEMENT OF ISSUES FOR REVIEW

1. This is not a proper case for certiorari.
   (a) The case for which review is sought is both academic and episodic.
   (b) There are no justiciable issues about the Open and Public Meetings Act (Title 52, Chapter 4, U.C.A., 1953, as amended; ["Sunshine Law"]).
   (c) Richfield City's conduct demonstrates neither past nor present intention to violate the Sunshine Law.
   (d) Richfield City complied superabundantly with the Sunshine Law.
2. This Supreme Court has previously decided any pertinent issues of entitlement to or property interest in future employment.
3. Petitioner is still raising matters never urged before the Court of original jurisdiction or in any providing except for the first time before the Court of Appeals.[1]

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[1] So-called "Richfield City Policy Department, Policies and Procedures Manual", a document written by Ward for his subordinates without foundational evidence (of which there is none) that it was ever adopted as an organic or legislative act of Richfield City.

INTRODUCTION

[STATEMENT OF THE CASE]

The Petitioner will be referred to as "Ward" and the Respondents will be referred to collectively as "Richfield".

This is an action in which Ward seeks $250,000.00 in general damages, $250,000.00 punitive damages, reinstatement as Chief of Police, attorneys' fees and other relief for his dismissal as Richfield's Chief of Police.

At a meeting held April 2, 1981 which was in complete compliance with the Open and Public Meeting Act (Chapter 4 Title 52 "Sunshine Law") Richfield terminated Ward as its Chief of Police. Ward threatened a lawsuit because his dismissal was not specifically mentioned on the agenda for the April 2nd meeting; therefore, on June 8, 1981 Richfield held a meeting under a posted and published agenda which specifically enumerated for consideration the proposal to terminate Ward as Chief of Police. Immediately before this meeting Richfield was served with a Temporary Restraining Order which the District Judge later held should not have been issued or at its best (i.e.: if it ever had any validity) expired by its own terms. The District Court was of the opinion that §10-3-911, Utah Code Annotated, 1953 applied to 3rd class cities, divesting the court of jurisdiction, and the restraining order should not have issued. The no-jurisdiction ruling was reversed in *Ward vs. Richfield City, et al.*, [Ward I] 716 P.2d 265 (Utah 1984). We do not dispute the correctness of that Decision.

NATURE OF THE CASE

Ward wants this Court of last resort to review a fully considered and eminently well-reasoned, unanimous decision of the Utah Court of Appeals which affirmed a Summary Judgment based on uncontradicted affidavits before the District Court.

COURSE OF THE PROCEEDINGS

As stated in Nature of the Case.

DISPOSITION IN THE LOWER COURTS

As stated in Nature of the Case. (The Decision of the Utah Court of Appeals dated June 14, 1989 is attached hereto as Appendix pp. i.1 - i.7.)

SUMMARY OF ARGUMENT

1. Rule 43 does not suggest Certiorari in this Case. The Petitioner is asking review by Certiorari to the Court of Appeals whose thoroughly well-reasoned Opinion treated and correctly applied all pertinent Utah statutory and common law and federal and state precedents from all jurisdictions, especially cases of the Utah Supreme Court which are *stare decisis.* This case has neither special nor important dimension sufficiently significant to warrant review by certiorari.

2. Utah's Open and Public Meeting ("Sunshine") Law was not offended and needs no further interpretation by the Court; especially as applied to this Case. The facts in this case do

not involve or even suggest, let alone draw into question, any ambiguity in the Sunshine Law. As the Court of Appeals held, even if a technical violation occurred (which the Court of Appeals held did not) it was promptly cured by appropriate- though quite possibly unnecessary - action by the City Council. (Appendix p. i.4)

3. The Utah Supreme Court has decided all tenure issues relevant to this case. Specifically in *Hutchison vs. Cartwright*, 692 P.2d 772-774 (Utah 1984), (Appendix pp. iii.1 - iii.3) and in other cases the Utah Supreme Court has held broadly and without limitation that a Chief of Police has no right to notice, hearing or a showing of cause on his dismissal.

4. The Municipal Code (Title 10, U.C.A., 1953) has been amended in many particulars making questions concerning the Code moot. The position held by Ward, "marshall" in a third class city, is no longer a statutory office. Construction of the statute under which Ward claims would be the interpretation by this Court of a repealed statute with no prospective precedential consequence.

5. "Rules and Regulations" under which Ward claims tenure are neither supported by foundation nor proof of adoption; were raised for the first time on appeal. Ward attempts self-levitation by asserting (for the first time on appeal) that rules which he had personally authored gave him an expectancy of future employment or a right to a hearing, and requiring at that hearing, cause for dismissal. These "Rules" were never adopted

by the city legislators or otherwise acted upon by the City Council. They were rules composed by Ward by which he proposed to govern his subordinates; and they do not even purport to govern or by the most extreme extension affect the Chief of Police (Marshal).

BRIEF OPPOSING CERTIORARI

Come now the Respondents, Richfield City, et al., and respectfully oppose the granting of Certiorari in the captioned case upon the grounds and for the following Reasons:

REASON I. CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE FOR FAILURE TO MEET THE REQUIREMENTS OF RULE 43 OF THE UTAH SUPREME COURT.

Rule 43 of the Utah Supreme Court ("Rule 43") codifies the sound principle that review by writ of certiorari will be granted

> "only where there are special and important reasons therefor." [Supra pp. 1, 2 and Infra; Appendix ii]

The enumeration of the indicators found in sub-paragraphs (1) through (4) of Rule 43, although "neither controlling nor measuring [the Supreme] Court's discretion", exclude Petitioner's case from the slightest justification for consideration on certiorari to the Court of Appeals.

By making arguments of ineligibility for certiorari Respondents both respectfully and emphatically do not concede that the Court of Appeals has decided this case incorrectly.

The United States Supreme Court under its Rule 17 (similar to Rule 43) in *Rice vs. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 said:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does

> it sit for the benefit of the particular litigants. [Citations] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

This case is both academic because the Utah Supreme Court has held that the office of Sheriff (concomitant to that of a Chief of Police) is subject to the appointing power's authority to dismiss without hearing, notice or cause, *Hutchison vs. Cartwright,* 692 P.2d 772 - 774 (Utah 1984); and episodic, because the rulings only touch upon the Sunshine Law in the most tangential way; i.e.: Ward was dismissed at a meeting when that particular action was not specifically on the agenda. If his dismissal does not require a hearing, notice or cause then it does not need to be the subject of formal action and therefor not the object of an agenda. Then, because Ward wanted to martial support by means of the Sunshine Law (in his words) "significantly [to] influence the public body" (Brief p. 11), the City accommodated him with a posted and media-published agenda only to be met with an ex parte Temporary Restraining Order (hereinafter "TRO") interpreted by Ward to say that the City could not attempt to hold a legal meeting to dismiss him. Counsel handled this part of the case disingenuously. [Ex-parte] He could easily have made contact with the City's attorney - he has been calling him regularly to attempt settlement - but chose not to tell him that he was either seeking or serving a TRO; rather, he chose to have it obtained on June 7, 1981, and served just a few minutes before the June 8th meeting without prior notice to the City or its attorney. The Trial Judge protected the City against chaos by striking from the

TRO, proposed and submitted to him by Ward's counsel, the words "***plaintiff [Ward] be and he is hereby reinstated as Chief of Police pending a determination of the legal issues involved in this litigation by this court." After carefully reading the Court-stricken sentence and the remainder of the TRO, the City went about carefully not to violate it but only ratified what the Council had done previously. The TRO told the City to do nothing further to terminate Ward.

The City appeared in obedience to the Show Cause Injunction of the TRO and the trial court dismissed the action. This Court, as the Brief states, did reverse that ruling but only on the ground that the Trial Court had erred in its holding that it had no jurisdiction. We do not argue, but to the contrary agree, with that result.

This case went to the Federal Court purporting to be a civil rights action where the U.S. District Court held that the Civil Rights Act (Title 42 §1983, U.S. Code) will not be invcked to redress violations of a State statute (here the Sunshine Law) and also, to the extent that Amendment XIV to the United States Constitution interdicts confiscatory action, that Ward had no property right in his previously held office as a Chief of Police; neither did he suffer loss of liberty through defamation of his character. [Per Winder, Judge, U.S. District Court for Utah, (Appendix pp. vii.1 - vii.9)]

This is about as episodic as a bi-jurisdictionally dismissed case can become.

The *Sioux City* case (349 U.S. at 74) talks about a demonstration that the public body was "willful" in its intent to deny a constitutional right (per Justice Frankfurter) "***at least four members of the Court deemed that despite the rather [sic] unique circumstances of the case Iowa's willingness to enforce the restrictive covenant rendered it 'special and important'". [Emphasis added]

Richfield always acted without animosity but contrarily with the highest concern and deference not only for Ward's legal rights but also for his professional career.

The record is replete with the Richfield City Council's repeated attempts to try to get Ward to change the possessive regimentation of his policemen and other subordinate officers that characterized his tenure; to "mend his ways"; relax his stiffness and get along with law enforcement work. One uncontradicted affidavit said the Mayor and Council "entreated" Ward to relax his irresiliency so that he would be sufficiently tractable to work with his men for the good of everyone, including Ward. The Mayor and Council interviewed Ward at least at the first (the challenged April 2, 1981) meeting instructing him to be less abrasive and militant in his attempts at discipline or compulsory *esprit de corps.*

Holding a special meeting for which a super-abundant effort was made to comply with the Open and Public Meeting Act (Chapter 4, Title 52, U.C.A. 1953, as amended) is demonstrative of a willingness on the part of Richfield City to observe

sedulously the Sunshine Law. The City Council gave Ward everything he asked for respecting notice and opportunity to be heard even though some of this may have been legally superfluous.

We respectfully represent to the Court that we are not in any respect fearful of Petitioner's challenge fully to brief, argue and present this case to the Court on certiorari; however, it is one not deserving of this Court's attention.

It certainly does not fall within Ward's description of the lower appellate court's treatment of the case where counsel states that:

> The high standards of the Utah State judicial system and the rights of the Appellant demand a more professional analysis. [Brief of Ward on Petition for Rehearing before the Court of Appeals, p. 15; (Appendix vii)]

We have the highest respect for this Court in its office as the last resort for all appeals. We have similar regard for the perspicacity and scholarship of the Court of Appeals. We think that Ward might be correct that this Court may organize an unexampled professional analysis; and at the same time we do not think that this degree of excellence, the finiteness of time, and the purposes for which the Court of Appeals was established justify certiorari to that Court of this single-issue, episodic case.

This would be to review private litigation; in some respects to be merely advisory, to speculate on what the Sunshine Law means in respects not before this Court and re-constructing what opinion the District Court held regarding his own Order to

Show Cause when he has already articulated what he thought of it on re-examination.

REASON II. THE TRIAL COURT DID NOT ERR IN REFUSING SANCTIONS AGAINST THE CITY.

The Court of Appeals correctly, irrespective of the disparaging remarks made by Ward in his Petition for Certiorari, made a scholarly analysis of the Sunshine Law. They said (p. 4 of the Opinion [Appendix p. i.4])

> Second, even if technical violations had occurred in the April meeting, they were subsequently cured. On June 5, notice of the special session scheduled for June 8 was provided to the local newspaper and the radio station in compliance with the agenda and notice provisions of section 52-4-6(3). The agenda for the June 8 meeting included Ward's discharge and the media was notified more than twenty-four hours in advance. At the June meeting, the Council voted without opposition to ratify its actions taken at the April meeting. Ward argues that the action taken at the June meeting violated the temporary restraining order.[2] The order restrained the Council from taking <u>further</u> action against him. Richfield City argues that the June meeting merely ratified action that had already been taken and, therefore, was not new action.
>
> In a proceeding for violation of an injunction, it is generally held that the extent of the punishment rests in the sound discretion of the court. <u>See Hensley v. Board of Education</u>, 210 Kan. 858, 504 P.2d 184, 189 (1972); <u>People v. Mulgrew</u>, 19 Ill. App. 3d 327, 311 N.E.2d 378, 383 (1974). "The inherent power of a court rendering a permanent injunction to enforce its decree and to modify or revoke the injunction for equitable reasons due to changed conditions is generally recognized . . . ." <u>Mulgrew</u>, 311 N.E.2d at 382. The trial court held that it was not in the public's best interest to void the action taken by the Council in

terminating Ward. We will not disturb judgments in injunction proceedings that rest within the sound discretion of the trier of facts, unless an abuse of discretion clearly appears from the record. See Hensley, 504 P.2d at 188.

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[2]Ward asserts that he would have mobilized supporters had he known the Council planned on taking action despite the temporary restraining order. However, the Council was under no duty to notify Ward personally of its intended action.

REASON III. THE CLAIMED MERITS OF THIS CASE ARE ACADEMIC, HAVING BEEN DECIDED BY *HUTCHISON VS. CARTWRIGHT.* 692 P.2D 772 (UTAH 1984).

In *Hutchison vs. Cartwright.* 692 P.2d 772, (Utah, Nov. 14, 1984) the Utah Supreme Court, and after it had decided the Ward I case, in a unanimous opinion held that in the absence of a statute requiring cause for dismissal the officer or board which had made the appointment has authority to suspend or dismiss the appointee (in *Hutchison* a jailer) "without charges, notice, or hearing", [emphasis supplied] because unless the statute on appointment or dismissal expressly so provides, that officer serves "at the pleasure" of the appointing authority.

Hutchison claimed in his lawsuit that he had been dismissed by the sheriff who had no authority to effect the dismissal and primarily that he was entitled to notice and a hearing.

Justice Zimmerman at pages 773 and 774 of 692 P.2d writes:

This issue was considered in Sheriff of Salt

> Lake County vs. Board of Commissioners of Salt Lake County, 71 Utah 593, 268 P.783 (1928). There the Court dealt with the question of whether county commissioners could suspend or dismiss deputy sheriffs against the will of the sheriff. ***The Court stated that unless otherwise controlled by statute, the power to suspend or dismiss is appurtenant to the power to appoint. When an individual is appointed by an official, "the office is held during the pleasure of the authority making the appointment and . . . no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer." 71 Utah at 596, 268 P. at 784. [Emphasis added]

[For the Court's convenience we have attached a copy of the *Hutchison* Decision as Appendix pp. iii.1 - iii.3]

The Federal Court, although not controlling but nevertheless helpful, has said that Ward has no right to the expectancy of future employment by the City.

REASON IV. AMENDMENTS TO THE MUNICIPAL CODE MAKE THE QUESTION PRESENTED HERE ABSTRACT AND THE ALREADY ABSTRACT QUESTION MOOT.

The law respecting appointment and removal of public safety department heads in cities of the third class and towns has been sharply amended; so sharply that to write an opinion on the merits of this case would be to treat an entirely academic and repealed, now hypothetical code provision (Laws of Utah 1987 Chapter 207 [Senate Bill No. 154 passed February 25, 1987, effective April 27, 1987]). The enactment of this chapter eliminates any need for the Supreme Court of the State of Utah to interpret §10-3-916. Chapter 207 of the Forty-Sixth Legislature also repeals §10-3-911. In the United States Supreme Court case

of *Rice vs. Sioux City Memorial Park Cemetery,* (supra) the pointlessness of reviewing by certiorari a lower court's interpretation of a superceded statute is emphasized (75 S.Ct. 617, 618, 349 U.S. 77-79). In the *Rice* case it is notable that the United States Supreme Court had already granted certiorari, nevertheless certiorari was dismissed as "improvidently granted" (75 S.Ct. 618, 349 U.S. 77) and no decision made or opinion written.

REASON V. THE SUNSHINE LAW DOES NOT MAKE ANY ACTION VOID.

Section 52-4-8 states that "any final action taken in violation of §52-4-3 or §52-4-6 is voidable by a court of competent jurisdiction". No one can seriously suggest that the Sixth Judicial District Court does not possess jurisdictional competency. If municipal, administrative, legislative, or rule-making action is voidable by a court of competent jurisdiction it is ordinarily presumed that the court has broad and usually undisturbable discretion to apply a form of validity. Ordinarily an act, proceeding, or legislative measure, if "voidable", can be ratified (as in the case of the other party affected) or affirmed (as in the case of the party whose act is deficient) *Southern Pacific vs. Industrial Commission,* 91 P.2d 700 (Arizona 1939); however, in this case the legislature expressly chose the term "voidable" to be distinguished from the word "void". We make this statement largely in response to Ward's assertion that the action of April 2nd was "void" and therefore irremediable. Although of minor consequence we make the counter-argument that the statute itself

contemplates circumstances where the action can be remedied by reaffirmation or ratification. Even where the word "void" is employed by the legislature it is ordinarily construed by the courts as having the more liberal meaning of "voidable". *Southern Pacific vs. Industrial Commission*, 91 P.2d 700 (Arizona 1939).

CONCLUSION

For the foregoing reasons we respectfully suggest that the Supreme Court of the State of Utah not issue a Writ of Certiorari to the Court of Appeals; this case not having dimensions either "special" or "important" under Rule 43, Rules of The Utah Supreme Court.

Respectfully submitted,

OLSEN, McIFF & CHAMBERLAIN

By _____
Ken Chamberlain
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that four (4) copies of the foregoing Brief in Opposition to Petition for Certiorari were mailed to George E. Brown, Jr. Attorney for Petitioner, 7001 South 900 East, Suite 240, Midvale, Utah (84047), by U.S. regular mail, postage prepaid, this 7th day of September, 1989.

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IN THE UTAH COURT OF APPEALS

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Boyd A. Ward, Plaintiff and Appellant, v. Richfield City, a municipal corporation, et al., Defendants and Respondents.	)	OPINION (For Publication) Case No. 880713-CA

Sixth District, Sevier County
The Honorable Don V. Tibbs

Attorneys: George E. Brown, Jr., Midvale, for Appellant
Ken Chamberlain, Richfield, for Respondents

Before Judges Davidson, Billings, and Garff.

DAVIDSON, Judge:

This appeal concerns whether appellant, Boyd Ward, was properly dismissed as Richfield City Chief of Police. Ward claimed below that the Utah Open and Public Meetings Act was violated, that the Richfield City Council disregarded a temporary restraining order by taking further subsequent action to dismiss him as Chief of Police, and that his request for an administrative appeal was improperly denied. The trial court granted summary judgment in favor of Richfield City. We affirm.

FACTS

On April 2, 1981, the Richfield City Council held a public meeting after publishing an agenda as required by Utah Code Ann. § 52-4-6 (1981). The agenda did not list Ward's discharge as Chief of Police. Following discussion of items on the agenda, the Council voted to hold a closed meeting and

invited Ward to join them in discussing his position as Chief of Police. The Council was concerned about several recent resignations within the police department. Discussion of Ward's termination ensued and the Council decided to terminate Ward. The Council resumed open session and formally voted to discharge Ward effective April 3, 1981.

On April 6, 1981, Ward submitted a written request to the Council for an administrative appeal pursuant to Utah Code Ann. §§ 10-3-1105 and -1106 (1981). The request was denied. On June 5, 1981, the Council published notice that a special meeting would be held on June 8, 1981, to ratify its actions taken at the April meeting. The Council published an agenda that included Ward's discharge as an item for discussion. Prior to the meeting, Ward served the Council with a temporary restraining order, to restrain it from taking any further action against him. Despite the temporary restraining order, the Council ratified its decision to terminate Ward.

On June 17, 1981, the trial court held a preliminary injunction hearing and determined that pursuant to the removal statute for chiefs of police, Utah Code Ann. § 10-3-911 (repealed 1987), it had no jurisdiction to hear the matter. Section 10-3-911 stated in part that "[t]he chief of police or fire department of the cities may at any time be removed, without a trial, hearing or opportunity to be heard, by the board of commissioners whenever in its opinion the good of the service will be served thereby."

Ward appealed the trial court's decision to the Utah Supreme Court and the court decided in Ward v. Richfield City, 716 P.2d 265 (Utah 1984), that the trial court did have jurisdiction because section 10-3-911 did not pertain to third class cities. The case was remanded to the trial court. On remand, the trial court granted summary judgment in favor of Richfield City. The court ruled that although the agenda for the April 2, 1981 meeting did not include the termination of Ward as Chief of Police, nevertheless, it was not in the public interest to void the Council's action at either the April 2 or the June 8 meeting.

Ward contends on appeal that: (1) the Council violated the Utah Open and Public Meetings Act in the April 2, 1981 meeting; (2) the Council, on June 8, 1981, acted in violation of the temporary restraining order; (3) the Council wrongfully denied him the right to appeal his discharge; (4) the trial court erroneously applied the law in granting summary judgment in

favor of Richfield City; and (5) he is entitled to reinstatement, back pay and damages.

UTAH OPEN AND PUBLIC MEETINGS ACT

We first examine whether the Council violated the Utah Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1 to -9 (1981), at the April 2, 1981 meeting and if so, whether the June 8 meeting cured any such violation. The purpose of the Utah Open and Public Meetings Act is to ensure that the actions of the state, its agencies, and political subdivisions are conducted openly. See Common Cause of Utah v. Utah Public Serv. Comm'n, 598 P.2d 1312 (Utah 1979). Political subdivisions, as defined in Utah Code Ann. § 10-1-201 (1981), include municipal corporations and municipalities. Utah Code Ann. § 10-3-601 (1981) provides that all meetings of the governing body of each municipality shall be held in compliance with the provisions of the open and public meetings law.

Ward contends that Richfield City failed to comply with the agenda and notice provisions of the open meetings law and that such failure should void the action taken at the April meeting. Ward argues that the subject of his discharge should have been listed on the agenda, even if discussions regarding him were conducted in a closed meeting. This contention fails for two reasons. First, the open meetings act designates certain subjects which are exempt from discussion in open meetings. See section 52-4-5. Where at least two-thirds of the public body present at an open meeting vote to hold a closed meeting to discuss the character, professional competence, or physical or mental health of an individual, then a closed meeting may be held. See section 52-4-4. The Council voted in the April open meeting to sequester themselves to discuss Ward's professional competence in compliance with section 52-4-4. The Council concluded the closed meeting with a unanimous vote, one member abstaining, to discharge Ward. Minutes of the closed meeting were recorded and when the Council resumed open session, a formal vote to discharge Ward was taken.[1]

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1. Prior to the closed session, the Council asked whether anyone present wanted to be notified if open session resumed. Most of those present were members of the media and they responded that they did not necessarily desire to return, but wanted to be advised if action were taken.

Second, even if technical violations had occurred in the April meeting, they were subsequently cured. On June 5, notice of the special session scheduled for June 8 was provided to the local newspaper and the radio station in compliance with the agenda and notice provisions of section 52-4-6(3). The agenda for the June 8 meeting included Ward's discharge and the media was notified more than twenty-four hours in advance. At the June meeting, the Council voted without opposition to ratify its actions taken at the April meeting. Ward argues that the action taken at the June meeting violated the temporary restraining order.[2] The order restrained the Council from taking any further action against him. Richfield City argues that the June meeting merely ratified action that had already been taken and, therefore, was not new action.

In a proceeding for violation of an injunction, it is generally held that the extent of the punishment rests in the sound discretion of the court. See Hensley v. Board of Education, 210 Kan. 858, 504 P.2d 184, 189 (1972); People v. Mulgrew, 19 Ill. App. 3d 327, 311 N.E.2d 378, 383 (1974). "The inherent power of a court rendering a permanent injunction to enforce its decree and to modify or revoke the injunction for equitable reasons due to changed conditions is generally recognized . . . ." Mulgrew, 311 N.E.2d at 382. The trial court held that it was not in the public's best interest to void the action taken by the Council in terminating Ward. We will not disturb judgments in injunction proceedings that rest within the sound discretion of the trier of facts, unless an abuse of discretion clearly appears from the record. See Hensley, 504 P.2d at 188.

RIGHT TO APPEAL DISCHARGE

The Mayor, with the advice and consent of the Council, appointed Ward to the position of Richfield City Chief of Police, pursuant to Utah Code Ann. § 10-3-916 (1981). This same body had the authority to dismiss Ward, without a hearing, notice, or cause. In Hutchison v. Cartwright, 692 P.2d 772, 773-774 (Utah 1984), the court held that unless otherwise controlled by statute, the power to suspend or dismiss is

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2. Ward asserts that he would have mobilized supporters had he known the Council planned on taking action despite the temporary restraining order. However, the council was under no duty to notify Ward personally of its intended action.

appurtenant to the power to appoint. "When an individual is appointed by an official, 'the office is held during the pleasure of the authority making the appointment, and . . . no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer.'" Id. at 774 (quoting Sheriff of Salt Lake County v. Board of Comm'rs, 71 Utah 593, 268 P. 783, 784 (1928)). "The rule of common law was that the appointment to municipal office carried with it no vested property interest in continued employment, and such officers were subject to removal without cause, reason or hearing unless otherwise prescribed." Carlson v. Bratton, 681 P.2d 1333, 1337 (Wyo. 1984). Since the Utah Supreme Court determined that section 10-3-911 did not apply, there is not an applicable statute explicitly governing the dismissal of chiefs of police or city marshals in third class cities.[3] Therefore, based on common law, we conclude that the Mayor and the Council had independent authority to discharge Ward, without a hearing, notice or cause.

Ward, nevertheless, contends that he has a right to appeal his discharge under sections 10-3-1105 and -1106. Section 10-3-1105 provides that "[a]ll appointive officers and employees of municipalities, other than members of the police departments, fire departments, heads of departments, and superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided." (Emphasis added.) Ward argues that he does not fall within the exception because he is not a member of a "police department" per se, but a city marshal with appointed assistants. However, we read sections 10-3-1105 and -1106 as specifically excluding him. Other sections in chapter 10 use the term "chief of police" interchangeably with "city marshal." See, e.g., Utah Code Ann. § 10-3-918 (1986). As

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3. Ward contends that the trial court erroneously applied Utah Code Ann. § 10-6-32 which was repealed in 1977. This section provided for the term of employment and removal of appointed officers, without cause, in first, second and third class cities. This section was not replaced with a statute expressly directing the removal of chiefs of police in third class cities. However, in light of our analysis that Ward does not have a right to appeal and that he can be removed without cause, we find that the trial court, nevertheless, reached the correct result. Therefore, the trial court's application of section 10-6-32 was harmless error.

Chief of Police, we hold that Ward is both a member of a "police department" and the head of that "department."

Ward also argues that even if he falls within the exception to section 10-3-1105 because he is a chief of police, nevertheless, the language in the second sentence of section 10-3-1106 applies to "any officer." Because these sections must be read together and should harmonize with the purpose of the whole act, Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984), we hold that the language "as hereinafter provided" in section 10-3-1105 specifically modifies the sections that follow. "Separate parts of [an] act should not be construed in isolation from the rest of the act." Id. See also Stahl v. Utah Transit Auth., 618 P.2d 480, 481 (Utah 1980). Therefore, "any officer" as appears in section 10-3-1106 must mean any officer not excluded in section 10-3-1105.

Our holding is in keeping with the rationale behind the power to discharge a chief of police without a hearing, notice, or cause. Since the chief of police is appointed to carry out the policies of the mayor "[t]he position of chief of police is clearly recognized as different than that of any other position in the police department for the obvious reason that the chief of police is in a position of making and carrying out policy for the mayor." Carlson, 681 P.2d at 1335. The result is there is no protected property interest in the position of chief of police. Id. at 1337.[4]

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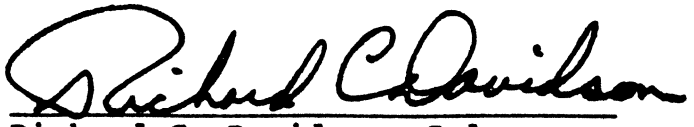
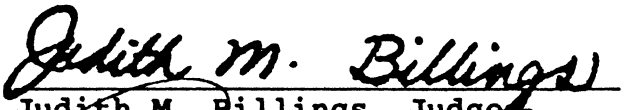
4. Ward contends that he has a right to appeal under the "Richfield City Police Department Policies and Procedures Manual." The pertinent sections of the manual provide that a member of the department may request a review of disciplinary action by submitting a written request to the chief of police and that dismissals are subject to appeal to the Richfield City Appeals Board. However, these sections specifically pertain to officers under the supervision of the chief of police and not to the chief himself.

The summary judgment is affirmed.

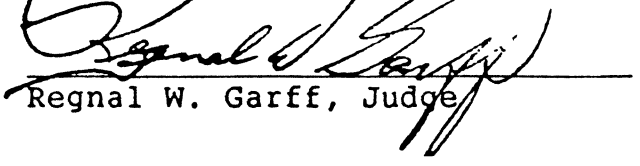


Richard C. Davidson, Judge

WE CONCUR:



Judith M. Billings, Judge



Regnal W. Garff, Judge

TITLE VI. JURISDICTION ON WRIT OF CERTIORARI TO COURT OF APPEALS.

Rule 42. Review of judgments, orders, and decrees of Court of Appeals.

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah. (Added, effective April 20, 1987.)

Rule 43. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this court.

(Added, effective April 20, 1987.)

Rule 44. Certification and transmission of record; filing; parties.

(a) **Appearance, docketing fee, filing, and service.** Counsel for the petitioner shall, within the time provided by Rule 45, pay the certiorari docketing fee and file, with proof of service as provided by Rule 21, ten copies of a petition which shall comply in all respects with Rule 46. The case then will be placed on the certiorari docket of the court. Counsel for the petitioner shall serve four copies of the petition on counsel for each party separately represented. It shall be the duty of counsel for the petitioner to notify all parties in the case of the date of filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21.

(b) **Joint and separate petitions.** Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases.

decision of the Trial Court, the Appellant has spent several years appealing the decision which was based upon the repealed statute. The high standards of the Utah State judicial system and the rights of the Appellant demand a more professional analysis.

Based upon the foregoing arguments, Appellant Boyd A. Ward respectfully requests that the Court of Appeals reconsider it's decision in this case and rule in favor of Appellant as set forth in the previous briefs.

RESPECTFULLY submitted this 27 day of June, 1989.

The attorney for Appellant Boyd A. Ward respectfully hereby certifies that this Petion for Rehearing is made in good faith without any intent to delay the proceedings herein.

George E. Brown, Jr.
Attorney for Appellant
Boyd A. Ward

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of this Petition for Rehearing of Appellant were mailed, postage prepaid, this 28 day of June, 1989, to the following:

Ken Chamberlain
Attorney for Defendants/Respondents
76 South Main Street
Richfield, Utah 84701

D36:motion

was truly driving in a weaving pattern. He stated that during the high-speed chase defendant "was kind of taking in the middle of the road all the say [sic], pretty well, except he's [sic] once in awhile get just a little too close to the shoulder and it would pull him over" and that defendant "got too close to the shoulder of the road and we about lost it." It was unclear whether the officer was referring to the right or left shoulder. Certainly driving in the middle of the road but occasionally getting close to the right shoulder is consistent with how a person would drive at high speeds. This testimony does not describe a weaving pattern where the driver goes from one side of the highway to the other or even from one lane to another. Officer Stoneking's testimony, standing alone, is insufficient to support a guilty verdict. Accordingly, we reverse the conviction of driving under the influence of alcohol.

We remand the case for a new trial on the charge of evading a police officer. No costs awarded.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

Clarence E. HUTCHISON, Plaintiff and Appellant,

v.

G. Lynn CARTWRIGHT, Beaver County Sheriff, and Board of Commissioners of Beaver County, State of Utah, Defendants and Respondents.

No. 18954.

Supreme Court of Utah.

Nov. 14, 1984.

County jailer brought action against county sheriff and board of commissioners alleging that he was wrongfully suspended and subsequently dismissed from his position. The Fifth District Court, Beaver County, J. Harlan Burns, J., entered summary judgment for defendants, and plaintiff appealed. The Supreme Court, Zimmerman, J., held that: (1) sheriff had cause and authority to dismiss plaintiff without concurrence of board of commissioners; (2) sheriff had not relinquished his power to summarily discharge by utilizing county grievance procedure as a mechanism for adjudicating issues raised by the termination; and (3) plaintiff's suspension and dismissal gave rise to no claims for violations of the open meetings law.

Affirmed.

1. Master and Servant ⇐30(4)
Municipal Corporations ⇐185(1)
Prisons ⇐7

County jailer's conduct at deposition in civil action in which he was a defendant, which was marked by conflict with both plaintiff's attorney and attorney provided by court to represent him, provided cause for sheriff to dismiss him.

2. Municipal Corporations ⇐185(3)
Prisons ⇐7

Sheriff, who had authority to hire county jailer, had authority to dismiss him without approval of county board of commissioners.

3. Municipal Corporations ⇐185(3)
Prisons ⇐7

Sheriff's choice to utilize county grievance procedure as mechanism for adjudicating issues raised by his termination of a jailer did not constitute a relinquishment of his power to summarily discharge.

4. Counties ⇐52
Prisons ⇐7

Because sheriff had independent authority to discharge county jailer for misconduct or other cause, no action by county commissioners was necessary for jailer's suspension or dismissal to become effective and, therefore, any meetings held or actions taken by the commissioner were irrelevant to legality of the suspension and dismissal which, therefore, gave rise to no claims for violations of open meetings law. U.C.A.1953, 52-4-1 et seq., 52-4-6.

Willard R. Bishop, Cedar City, for plaintiff and appellant.

John O. Christiansen, County Atty., Beaver, for defendants and respondents.

ZIMMERMAN, Justice:

Appellant seeks reversal of a summary judgment rejecting his claim that he was wrongfully suspended and subsequently dismissed from his position as Beaver County jailer, that the proper Beaver County policies and procedures were not followed in his discharge, that the state's open meetings law was not complied with, and that he was entitled to reinstatement and damages. We affirm the trial court.

In 1976, Clarence E. Hutchison, appellant, was hired as a deputy sheriff and jailer by the then Beaver County sheriff, Dale E. Nelson. Nelson later died and was replaced by respondent G. Lynn Cartwright. In May of 1981, Cartwright terminated appellant's employment as a deputy sheriff, although appellant continued as county jailer.

On February 11, 1982, appellant's deposition was taken in a civil action in which appellant was a named defendant. Appellant's conduct at the deposition was marked by conflict with both the plaintiff's attorney and the attorney provided by Beaver County to represent him. (The briefs and record are silent regarding the nature of the suit and the details of the conflicts arising at the deposition.) Five days later, after a meeting of respondent Beaver County Commission that was attended by Cartwright, Cartwright told appellant he was suspended from his position as county jailer. Three days later, Cartwright confirmed in writing that he had suspended appellant, citing as justification relevant provisions of the Beaver County Personnel Policy. Those provisions outline available disciplinary procedures for county personnel and provide that an employee is subject to "immediate dismissal" for "[i]ndulging in offensive conduct or using offensive language toward the public or toward the County officers or employees."

In early March, following an investigation of the matter and discussion with the Beaver County Commission, Cartwright wrote appellant and stated that he was making the suspension permanent. In response, appellant filed a formal grievance under the provisions of the Beaver County Personnel Policy for improper suspension and termination of employment, seeking reinstatement and payment of lost wages. The grievance was heard before the Beaver County Commission on April 1, 1982. All parties were present. Appellant was not reinstated. He sought judicial review in the district court for Beaver County, raising the same issues presented for our consideration on appeal. The district court entered summary judgment against him on all claims, finding that all necessary procedures for his suspension and dismissal were followed.

[1] Appellant's initial contention is that the sheriff had no authority to dismiss him without cause and without the concurrence of the Beaver County Board of Commissioners. This argument lacks merit. First, the record establishes that appellant's misconduct precipitated his dismissal. Appellant failed to controvert Cartwright's statement that he engaged in "serious conflict and argument" with counsel for Beaver County at the February 11th deposition. This Court has previously recognized that a sheriff may dismiss a deputy where the deputy "has been guilty of misconduct ...." *Fowler v. Gillman*, 76 Utah 414, 429, 290 P. 358, 364 (1930).

[2] Second, the sheriff had authority to dismiss appellant without the approval of the board of commissioners. This issue was considered in *Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County*, 71 Utah 593, 268 P. 783 (1928). There the Court dealt with the question of whether county commissioners could suspend or dismiss deputy sheriffs against the will of the sheriff. In holding that the commissioners could not, the Court stated that unless otherwise controlled by statute, the power to suspend or dismiss is

appurtenant to the power to appoint. When an individual is appointed by an official, "the office is held during the pleasure of the authority making the appointment, and . . no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer." 71 Utah at 596, 268 P. at 784. In the case at bar, the authority to hire and to dismiss appellant for misconduct or other cause rests not with the Beaver County Board of Commissioners, as appellant argues, but with the sheriff, who had the authority to and did hire appellant as a deputy and a jailer

[3] Appellant next contends that whether or not the sheriff initially had the right to suspend or discharge him, the sheriff voluntarily limited his authority by adopting the Beaver County Personnel Policy as the internal policy of the sheriff's department. Appellant argues that the sheriff is, therefore, bound by those rules relating to discipline, suspension, and termination. Appellant's contention fails. While in this particular case the sheriff chose to utilize the Beaver County grievance procedure as a mechanism for adjudicating the issues raised by this termination, nothing in the record indicates that this was other than a one-time occurrence. No evidence before us even suggests that the county's policies and procedures were adopted and ratified either formally or informally by the sheriff as binding on his department in all cases. Nor is there anything in the record suggesting that any county ordinance adopted by the Beaver County Commissioners made the policy applicable to the sheriff's department. The mere utilization of part of a county procedure by the sheriff in one particular instance cannot be equated with adoption of the entire policy of which that procedure is a part. Under such circumstances, we cannot say that the sheriff has relinquished his power to summarily discharge.

[4] Finally, appellant contends that respondents failed to comply with the notice provision of Utah's Open and Public Meetings Act and that such failure gave appellant the right to bring suit to void the action taken at an improperly held meeting, to wit: appellant's suspension and termination. U.C.A., 1953, § 52-4-6 (1981 ed.). However, because the sheriff had independent authority to discharge appellant for misconduct or other cause, no action by the county commissioners was necessary for the suspension or dismissal to become effective. Therefore, any meetings held or actions taken by the commissioners were irrelevant to the legality of appellant's suspension and subsequent dismissal. His suspension and dismissal gave rise to no claims for violations of the open meetings law.

For the reasons set forth above, we affirm.

HALL, C.J., STEWART, HOWE and DURHAM, JJ., concur.

Darrell NIELSEN, Plaintiff,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, Board of Review, Industrial Commission of Utah, and Edward R. Beale, Defendants

No. 19369

Supreme Court of Utah

Nov. 14, 1984

On review of award of unemployment compensation, the Supreme Court held that

1. The Utah legislature has enacted a statute governing the hiring and firing of deputy sheriffs, and it appears to apply to the facts of this case. U.C.A., 1953, § 17-30-1 (1973 ed.). However, neither party referred to or relied upon the statute in the proceedings below, therefore we cannot consider it on appeal. *Bible v. First National Bank of Rawlins*, 21 Ariz.App. 54, 515 P.2d 351, 353 (1974); *see, e.g., Wagner v. Olsen*, 25 Utah 2d 366, 482 P.2d 702 (1971).

349 U.S. 70

Evelyn RICE, Petitioner,

v.

SIOUX CITY MEMORIAL PARK CEMETERY, Inc., et al.

No. 28.

Argued Nov. 8, 9, 1954.

Decided May 9, 1955.

Action for damages for private cemetery's refusal to permit burial of plaintiff's alleged non-Caucasian husband in burial lot purchased by plaintiff under contract restricting burial privileges to members of Caucasian race. The District Court, Woodbury County, Iowa, rendered judgment for defendants, and plaintiff appealed. The Supreme Court of Iowa, 60 N.W.2d 110, affirmed the judgment, and plaintiff obtained certiorari, 347 U.S. 942, 74 S.Ct. 638, 98 L.Ed. 1091. The Supreme Court, 348 U.S. 880, 75 S.Ct. 122, affirmed by a divided court, and plaintiff petitioned for rehearing. On rehearing, the Supreme Court, Mr. Justice Frankfurter, held that where it appeared that new Iowa Statute prohibiting the denial of burial solely because of race or color of deceased would afford remedy in cases such as that at bar, certiorari would be dismissed as improvidently granted, even though full argument had been had.

Order vacated and writ of certiorari dismissed.

Mr. Justice Black, Mr. Chief Justice Warren and Mr. Justice Douglas dissented.

1. Constitutional Law ⇐209, 251

Protection of the Fourteenth Amendment can be invoked only if a state deprives any person or denies enforcement of a right guaranteed. U.S.C.A.Const. Amend. 14.

2. Courts ⇐397½

Supreme Court does not sit to satisfy a scholarly interest in intellectually interesting and solid problems, nor for the benefit of particular litigants.

3. Courts ⇐397½

"Special and important reasons", within Rule relating to granting of certiorari, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. Rules of Supreme Court, rule 19, 28 U.S.C.A.

See publication Words and Phrases, for other judicial constructions and definitions of "Special and Important Reasons".

4. Constitutional Law ⇐46(1)

Supreme Court has duty to avoid decision of constitutional issues unless avoidance becomes evasion.

5. Cemeteries ⇐16

Violation of Iowa Statute prohibiting the denial of privilege of interment solely because of decedent's race or color gives rise to a civil action for damages, as well as invoking statutory penalties. I.C.A. §§ 566A.1 to 566A.11.

6. Courts ⇐397½

Where it appeared to Supreme Court, while considering petition for rehearing on review of Iowa Supreme Court decision upholding defense based on provision in contract for sale of cemetery lot limiting right of interment to those of Causasian race, that recently-enacted Iowa Statute prohibiting the denial of burial solely because of race or color of deceased would afford remedy in cases such as that at bar, certiorari was dismissed as improvidently granted, even though full argument had been had. Rules of Supreme Court, rule 19, 28 U.S.C.A.; I.C.A. §§ 566A.1 to 566A.11; U.S.C.A.Const. Amends. 5, 14.

7. Courts ⇐397½

Certiorari should not be granted except in cases involving principles the settlement of which is of importance to public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal.

On Petition for Rehearing.

Mr. Lowell C. Kindig, Sioux City, Iowa, for petitioner.

Mr. Jesse E. Marshall, Sioux City, Iowa, for respondents.

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Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is an action for damages brought by plaintiff, petitioner here, in the District Court of Woodbury County, Iowa, to compensate her for mental suffering claimed to flow from defendant cemetery's refusal to bury her husband, a Winnebago Indian, after services had been conducted at the grave site and the burial party had disbanded. Plaintiff founded her action, so far as here relevant, on breach of a contract whereby defendant had undertaken to afford plaintiff "Right of Sepulture" in a specified lot of its cemetery. The contract of sale of the burial lot also provided that

> "burial privileges accrue only to members of the Caucasian race." 60 N.W.2d 112

Plaintiff asserted that this provision was void under both the Iowa and the United States Constitutions and that recognition of its validity would violate the Fourteenth Amendment. By an amendment to the complaint, plaintiff also claimed a violation of the United Nations Charter. The defense was anchored in the validity of the clause as a bar to this action.

After an abortive attempt to remove the case to the federal courts, D.C., 102 F.Supp. 658, defendants moved to dismiss the amended petition in the state court. This motion was denied, except that insofar as the amendment to the petition had relied on the United Nations Charter, the amendment was dismissed. Following Iowa procedure, the trial court entertained motions by both parties requesting it to adjudicate prior to trial points of law relating to the effect of the restrictive covenant. The Iowa court ruled that the clause was not void but was unenforceable as a violation of the Constitutions and public policy of Iowa and the United States. Nevertheless,

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it held that the clause "may be relied upon as a defense" and that "the action of a state or federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action" contrary to the Fifth and Fourteenth Amendments. It again ruled that the United Nations Charter was irrelevant, and the case was finally dismissed.

The Supreme Court of Iowa affirmed, reasoning that the decision of this Court in Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, when considered in conjunction with the In re Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, did not require a state court to ignore such a provision in a contract when raised as a defense and in effect to reform the contract by enforcing it without regard to the clause. The court further ruled that the provisions of the United Nations Charter "have no bearing on the case" and that none of the grounds based on local law sustained the action. 245 Iowa, 147, 60 N.W.2d 110, 117. We granted certiorari, 347 U.S. 942, 74 S.Ct. 638, 98 L.Ed. 1091.

[1] The basis for petitioner's resort to this Court was primarily the Fourteenth Amendment, through the Due Process and Equal Protection Clauses. Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked. Such a claim involves the threshold problem whether, in the circumstances of this case, what Iowa, through its courts, did amounted to "state action." This is a complicated problem which for long has divided opinion in this Court. See, e. g., Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78; Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152.

See, also, Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586. Were this hurdle cleared, the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment, would in turn present no easy constitutional problem.

[3]

The case was argued here and the stark fact is that the Court was evenly divided. 348 U.S. 880, 75 S.Ct. 122. In accordance with undeviating practice, no indication was given regarding the grounds of this division.

In addition to the familiar though vexing problems of constitutional law, there was reference in the opinions of the Iowa courts and in the briefs of counsel to the United Nations Charter. The Iowa courts dismissed summarily the claim that some of the provisions of the language of this Treaty, which so far as the United States is concerned is itself an exercise of the treaty-making power under the Constitution, constituted a limitation on the rights of the States and of persons otherwise reserved to them under the Constitution. It is a redundancy to add that there is, of course, no basis for any inference that the division of this Court reflected any diversity of opinion on this question.

Following our affirmance by necessity of the decision of the Iowa Supreme Court, a petition was filed for a rehearing before a full Court. In our consideration of this petition our attention has now been focused upon an Iowa statute enacted since the commencement of this litigation. Though it was in existence at the time the case first came here, it was then not seen in proper focus because blanketed by the issues of "state action" and constitutional power for which our interest was enlisted. This Iowa statute bars the ultimate question presented in this case from again arising in that State. In light of this fact and the standards governing the exercise of our discretionary power of review upon writ of certiorari, we have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, 28 U.S.C.A.

[2-4] This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case

[4]

merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed "special and important", the Rule refers to cases

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup.Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc.Am.Law Inst. 313. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis

in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688.

In the present case, certiorari was granted, according to our practice, because at least four members of the Court deemed that despite the rather unique circumstances of this case Iowa's willingness to enforce this restrictive covenant rendered it "special and important."

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We were unmindful at the time of Iowa's corrective legislation and of its implications. While that statute had been cited in the opinion of the Iowa Supreme Court, without quotation, in tangential support of a substantive argument, and while similar passing references appear in respondent's briefs in opposition to the petition and on the merits it was not even suggested as a ground for opposing certiorari. Its importance was not put in identifying perspective, and it did not emerge to significance in the sifting process through which the annual hundreds of petitions for certiorari pass. Argument at the Bar was concerned with other issues and the even division of the Court forestalled that intensive study attendant upon opinion-writing which might well have revealed the crucial relevance of the statute.

[5] These oversights should not now be compounded by further disregard of the impact of this enactment when viewed in the light of settled Iowa law, not previously brought to our attention, concerning its effect upon private litigation. The statute provides:

"Section 1. Any corporation or *other form of organization organized* or engaging in the business under the laws of the state of Iowa, or wheresoever organized and engaging in the business in the state of Iowa, of the ownership, maintenance or operation of a cemetery * * * except * * * churches or religious or established fraternal societies, or incorporated cities or towns or other political subdivisions of the state of Iowa * * * shall *be subject to the provisions of this* chapter

* * * * * *

Sec. 8. It shall be unlawful for any organization subject to the provisions of this chapter to deny the privilege of interment of the remains of any deceased person in any cemetery * * * solely because

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of the race or color of such deceased person. Any contract, agreement, deed, covenant, restriction or charter provision at any time entered into, or by-law, rule or regulation adopted or put in force, either subsequent or prior to the effective date of this chapter, authorizing, permitting or requiring any organization subject to the provisions of this chapter to deny [illegible] because of race or color of such deceased person is hereby declared to be null and void and in conflict with the public policy of this state. * * *

"Sec. 9. Any person, firm or corporation violating any of the provisions of this chapter, shall, upon conviction, be punishable by a fine of not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00).

* * * * *

"Sec. 12. Nothing in this Act contained shall affect the rights of any parties to any pending litigation.

"Approved April 21, 1953." Iowa Laws 1953, c. 84; Iowa Code Ann. §§ 566A.1 to 566A.11.

As a result of this Act, in any other case arising under similar circumstances not only would the statutory penalties be applicable, but also, under Iowa law, one in petitioner's position would be entitled to recover damages in a civil action based on a violation of the statute. See Humburd v. Crawford, 128 Iowa 743, 105 N.W. 330; Brown v. J. H. Bell Co.,

146 Iowa 89, 123 N.W. 231, 124 N.W. 901, 27 L.R.A.,N.S., 407; Amos v. Prom, Inc., D.C.N.D.Iowa, 117 F.Supp. 615.

Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would

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hardly have been brought here in the first instance.[1] Any adjudication of the constitutional claims pressed by petitioner would now be an adjudication under circumstances not promotive of the very social considerations which evidently inspired the Iowa Legislature to provide against the kind of discrimination of which complaint is here made. On the one hand, we should hesitate to pass judgment on Iowa for unconstitutional action, were such to be found, when it has already rectified any possible error. On the other hand, we should not unnecessarily discourage such remedial action by possible condonation of this isolated incident. Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

Such factors are among the many which must be weighed in the exercise of that "sound judicial discretion" which Rule 19 requires. We have taken this opportunity to explain their relevance, when normally, for obvious reasons in view of our volume of business, no opinion accompanies dismissal of a writ as improvidently granted, because of the apt illustration here provided of the kinds of considerations, beyond those listed by Rule 19 as illustrative but not exhaustive, which preclude adjudication on the merits of cases which may have the surface appearance of public importance.

[6, 7] We are therefore of the opinion that this Court's order of November 15, 1954, affirming by an equally divided Court the decision of the Iowa Supreme Court, must be vacated and the writ of certiorari dismissed as improvidently granted. There is nothing unique in such

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dismissal even after full argument. There have been more than sixty such cases and on occasion full opinions have accompanied the dismissal.[2] The circumstances of this case may be different and more unusual. But this

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impressive practice proves that the Court has not hes-

1. Cf. District of Columbia v. Sweeney, 310 U.S. 631, 60 S.Ct. 1082, 84 L.Ed. 1402, where certiorari was denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

2. United States v. Rimer, 220 U.S. 547, 31 S.Ct. 596, 55 L.Ed. 578; Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n, 242 U.S. 430, 37 S.Ct. 141, 61 L.Ed. 409; Tyrrell v. District of Columbia, 243 U.S. 1, 37 S.Ct. 361, 61 L.Ed. 557; Houston Oil Co. of Texas v. Goodrich, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385; Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712; Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413; Keller v. Adams-Campbell Co., 264 U.S. 314, 44 S.Ct. 356, 68 L.Ed. 705; Davis v. Currie, 266 U.S. 182, 45 S.Ct. 88, 69 L.Ed. 234; Erie R. Co. v. Kirkendall, 266 U.S. 185, 45 S.Ct. 33, 69 L.Ed. 236; Southern California Edison Co. v. Herminghaus, 275 U.S. 486, 48 S.Ct. 27, 72 L.Ed. 387; Mellon v. McKinley, 275 U.S. 492, 48 S.Ct. 34, 72 L.Ed. 390; Missouri-Kansas-Texas R. Co. v. State of Texas, 275 U.S. 494, 48 S.Ct. 82, 72 L.Ed. 391; Ellison v. Koswig, 276 U.S. 598, 625, 48 S.Ct. 320, 72 L.Ed. 724; Johnson v. Thornburgh, 276 U.S. 601, 48 S.Ct. 322, 72 L.Ed. 725; Carter Oil Co. v. Eli, 277 U.S. 573, 48 S.Ct. 435, 72 L.Ed. 994; Standard Pipe Line Co. v. Commissioners of Index Sulphur Drainage Dist., 278 U.S. 558, 49 S.Ct. 17, 73 L.Ed. 504; Seaboard Air Line R. Co. v. Johnson (New York, Chicago & St. L. R. Co. v. Granfell) 278 U.S. 576, 49 S.Ct. 95, 73 L.Ed. 515; Empire Gas & Fuel Co. v. Saunders, 278 U.S. 581, 49 S.Ct. 184, 73 L.Ed. 518; Virginian R. Co. v. Kirk, 278 U.S. 582, 49 S.Ct. 185, 73 L.Ed. 515; Wallace v. Motor Products Corp., 279 U.S. 589, 49 S.Ct. 21, 73 L.Ed. 522; Sutter v. Midland Valley R. Co., 280

itated to dismiss a writ even at this advanced stage where it appears on further deliberation, induced by new considerations, that the case is not appropriate for adjudication. In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in

U.S. 521, 50 S.Ct. 65, 74 L.Ed. 590; Anglo & London-Paris Nat. Bank of San Francisco v. Consolidated Nat. Bank of Tucson, 280 U.S. 526, 50 S.Ct. 87, 74 L.Ed. 593; Gulf, Mobile & N. R. Co. v. Williams, 280 U.S. 526, 50 S.Ct. 86, 74 L.Ed. 593; Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813, 51 S.Ct. 214, 75 L.Ed. 728; Adam v. New York Trust Co., 282 U.S. 814, 51 S.Ct. 214, 75 L.Ed. 728; Directors of Lands of Philippine Islands v. Villa-Abrille, 283 U.S. 755, 51 S.Ct. 341, 75 L.Ed. 1413; Sanchez v. Borras, 283 U.S. 798, 51 S.Ct. 490, 75 L.Ed. 1421; Elgin, Joliet & E. R. Co. v. Cantrell, 284 U.S. 589, 52 S.Ct. 128, 76 L.Ed. 508; Snowden v. Red River and Bayou Des Glaises Levee and Drainage Dist. of Louisiana, 284 U.S. 592, 52 S.Ct. 198, 76 L.Ed. 510; Lang v. United States, 286 U.S. 523, 52 S.Ct. 495, 76 L.Ed. 1267; Franklin-American Trust Co. v. St. Louis Union Trust Co., 286 U.S. 533, 52 S.Ct. 642, 76 L.Ed. 1274; Louisville & Nashville R. Co. v. Parker, 287 U.S. 569, 53 S.Ct. 94, 77 L.Ed. 501; Sevier Commission Co. v. Wallowa Nat. Bank, 287 U.S. 575, 53 S.Ct. 120, 77 L.Ed. 504; Fort Smith Suburban R. Co. v. Kansas City Southern R. Co., 288 U.S. 587, 53 S.Ct. 85, 77 L.Ed. 513; Boynton v. Hutchinson Gas Co., 292 U.S. 601, 54 S.Ct. 639, 78 L.Ed. 1464; Lynch v. People of New York ex rel. Pierson, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191; Hunt v. Western Casualty Co., 293 U.S. 530, 55 S.Ct. 207, 79 L.Ed. 639; Fox Film Corp. v. Muller, 294 U.S. 696, 55 S.Ct. 444, 79 L.Ed. 1234; State Automobile Ins. Ass'n v. Glick, 294 U.S. 697, 55 S.Ct. 550, 79 L.Ed. 1235; Moor v. Texas & N. O. R. Co., 297 U.S. 101, 56 S.Ct. 372, 80 L.Ed. 509; Texas & N. O. R. Co. v. Neill, 302 U.S. 645, 58 S.Ct. 118, 82 L.Ed. 501; Aetna Ins. Co. v. Illinois Central R. Co., 302 U.S. 652, 58 S.Ct. 269, 82 L.Ed. 505; Tax Commission of Ohio v. Wilbur, 304 U.S. 544, 58 S.Ct. 1036, 82 L.Ed. 1518; Goodman v. United States, 305 U.S. 578, 59 S.Ct. 363, 83 L.Ed. 364; Goins v. United States, 306 U.S. 622, 59 S.Ct. 783, 83 L.Ed. 1027; McGoldrick v. Gulf Oil Corp., 309 U.S. 2, 60 S.Ct. 375, 84 L.Ed. 536; Utilities Ins. Co. v. Potter, 312 U.S. 662, 61 S.Ct. 804, 85 L.Ed. 1109; Harris v. Zion's Savings Bank & Trust Co., 313 U.S. 541, 61 S.Ct. 840, 85 L.Ed. 1509; Jones v. City of Opelika, 315 U.S. 782, 62 S.Ct. 630, 86 L.Ed. 1189; Gorman v. Washington University, 316 U.S. 98, 62 S.Ct. 962, 86 L.Ed. 1300; McCullough v. Kammerer Corp., 323 U.S. 327, 65 S.Ct. 297, 89 L.Ed. 273; McCarthy v. Bruner, 323 U.S. 673, 65 S.Ct. 126, 89 L.Ed. 547; White v. Razen, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348; Woods v. Nierstheimer, 328 U.S. 211, 66 S.Ct. 996, 90 L.Ed. 1177; Phyle v. Duffy, 334 U.S. 431, 68 S.Ct. 1131, 92 L.Ed. 1494; Hedgepeth v. State of North Carolina, 334 U.S. 806, 68 S.Ct. 1185, 92 L.Ed. 1739; Superior Court of State of California v. Lillefloren, 335 U.S. 906, 69 S.Ct. 410, 93 L.Ed. 440; Loftus v. People of State of Illinois, 337 U.S. 935, 69 S.Ct. 1511, 93 L.Ed. 1741; Parker v. Los Angeles County, 338 U.S. 327, 70 S.Ct. 161, 94 L.Ed. 144; Hammerstein v. Superior Court of California, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135; Stembridge v. State of Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130; Edelman v. People of State of California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387; Bentsen v. Blackwell, 347 U.S. 925, 74 S.Ct. 528, 98 L.Ed. 1078; State of California ex rel. Brown v. St. Louis Union Trust Co., 348 U.S. 932, 75 S.Ct. 354. This list is not to be deemed comprehensive.

Only in the light of argument on the merits did it become clear in these numerous cases that the petitions for certiorari should not have been granted. In some instances an asserted conflict turned out to be illusory; in others, a federal question was wanting or decision could be rested on a non-federal ground; in a number, it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance.

not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712.

Writ of certiorari dismissed.

The petition for rehearing is granted. The order of this Court of November 15, 1954, affirming by necessity the

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judgment of the Supreme Court of Iowa is vacated and the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

Mr. Justice HARLAN took no part in the consideration or decision of this case.

Mr. Justice BLACK, with whom THE CHIEF JUSTICE and Mr. Justice DOUGLAS join, dissenting.

We think that only very unusual circumstances can justify dismissal of cases on the ground that certiorari was improvidently granted. Our objections to such dismissals are stronger when, as here, a case has already been argued and decided by the Court. We do not agree that the circumstances relied on by the Court justify this dismissal. We granted certiorari because serious questions were raised concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Those questions remain undecided. The Court dismisses the case because the Iowa Legislature has provided that every person in Iowa except one who has already filed a suit can prosecute claims like this. Apparently this law leaves everyone in Iowa free to vindicate this kind of right except the petitioner. This raises a new question of denial of equal protection of the laws equally as grave as those which prompted us to take this case originally. We cannot agree that this dismissal is justified merely because this petitioner is the only one whose rights may have been unconstitutionally denied.

349 U.S. 81

Robert Cecil BELL, Petitioner,

v.

UNITED STATES of America.

No. 468.

Argued April 21, 1955.

Decided May 9, 1955.

Defendant was convicted of violation of the Mann Act and sentenced to consecutive terms on each of two counts of indictment. The United States District Court, Eastern District of Tennessee, Southern Division, denied defendant's motion to correct the sentence, and defendant appealed. The District Court judgment was affirmed by the United States Court of Appeals for the Sixth Circuit, 213 F.2d 629, and defendant brought certiorari. The Supreme Court, Mr. Justice Frankfurter, held that transportation of two women on the same trip and in the same vehicle in violation of the Mann Act constituted a single offense.

Reversed.

Mr. Justice Minton, Mr. Chief Justice Warren and Mr. Justice Reed dissented.

1. Courts ⇐383(1)

The United States Supreme Court granted certiorari to review decision of Court of Appeals that defendant by transporting two women in violation of Mann Act, though on same trip and in

SOUTHERN PAC. CO. v. INDUSTRIAL COMMISSION et al.

No. 4087.

Supreme Court of Arizona.

June 19, 1939.

1. Workmen's compensation ⇐1027

Where a widow who is entitled to compensation has remarried and received a lump settlement of the compensation award, a legal annulment of the marriage will entitle her to have the original award reinstated upon tendering back the amount she received as lump settlement.

2. Estoppel ⇐63

Estoppel exists only when the party sought to be estopped, with full knowledge of all the facts bearing on the situation, takes a position which is inconsistent with one assumed later.

3. Workmen's compensation ⇐1027

Where a widow entitled to compensation remarried and accepted lump settlement of the compensation award in full release, such acceptance did not estop the widow from asking for a reinstatement of the original award after an annulment of her marriage.

4. Marriage ⇐1

"Marriage" is a status created by and based upon a civil contract.

[Ed. Note.—For other definitions of "Marriage," see Words & Phrases.]

5. Marriage ⇐1

The question of whether the status of marriage actually exists depends upon the rules governing the making of the contract upon which the status is founded.

6. Marriage ⇐12

The essentials of a valid contract, that the parties have capacity to enter into it and that they actually consent thereto, apply to a marriage contract.

7. Marriage ⇐58(1)

Under common law, where a marriage contract is proper in form but is entered into by parties who have not capacity to consent thereto, or who have consented in form but not in fact, the marriage contract may be annulled.

8. Marriage ⇐58(1)

Where a statute provides for what causes court may annul a marriage, court will look to the statute as the measure and limit of its authority. Rev.Code 1928, §§ 2166, 2178.

9. Statutes ⇐199

The word "void," in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force, but frequently the word is used by the Legislature and construed by the courts as having the more liberal meaning of "voidable." Rev.Code 1928, § 2178.

[Ed. Note.—For other definitions of "Void," see Words & Phrases.]

10. Marriage ⇐6

Physical incapacity for sexual intercourse usually does not render a marriage void, but voidable merely, and the marriage is regarded as valid until regularly dissolved at the suit of the wronged party.

11. Marriage ⇐58(1)

The word "void," as used in statute authorizing annulment of marriage where [illegible] in cases of physical incompetency, to marriages subject to ratification or disaffirmance by the injured party, as well as to those which cannot be ratified. Rev.Code 1928, §§ 2166, 2178.

12. Marriage ⇐58(2)

Under the annulment and divorce statutes, physical incompetency is not a ground of annulment, but of divorce only, notwithstanding all other forms of voidable marriages are subject to annulment. Rev.Code 1928, §§ 2166, 2178.

13. Workmen's compensation ⇐1027

Where widow entitled to compensation remarried and accepted lump settlement of the compensation award and later secured annulment of the marriage on ground husband was physically incompetent, she could not have lump settlement set aside and award reinstated, since physical incompetency of husband was not a ground for annulment authorized by law and court granting the annulment therefore had no jurisdiction to do so. Rev.Code 1928, §§ 2166, 2178.

Appeal by Certiorari from Industrial Commission.

Proceeding under the Workmen's Compensation Act by Lorena O. Davis, applicant, against the Southern Pacific Company and the Industrial Commission of

Arizona, L. C. Holmes, Sam Proctor and Mortie Graham, as members of the Commission. From an award of the Industrial Commission reinstating an award previously made in favor of the applicant, the Southern Pacific Company appeals by certiorari.

Award set aside and case remanded.

Baker & Whitney and Lawrence L. Howe, all of Phoenix, for petitioner.

Riney B. Salmon and J. A. Riggins, Jr., both of Phoenix, for respondent Lorena O. Davis.

LOCKWOOD, Judge.

Southern Pacific Company, a corporation, the petitioner, has brought before us for review an award of the Industrial Commission of Arizona, the respondent, reinstating a certain award previously made by respondent in favor of Lorena O. Davis, the beneficiary.

The questions for our determination are of law only, and the facts necessary for their determination are not disputed. We state them as follows: On April 14, 1926, William A. Davis, the husband of Lorena O. Davis, was in the employ of petitioner. On that date, and in the course of his employment, he received injuries resulting in his death. His widow made application to respondent for an award for the support of herself and children, and on July 8, 1926, respondent awarded her the sum of $61.42 monthly for her support, which payments were to continue until her death or remarriage. In the latter event she was to be paid a lump sum of $1,474.08, in final settlement of the award. There were several minor children of the deceased, and an award was made in their favor also, but as they are now of age and their rights are not involved in the present case, we need not refer further to them.

On January 20, 1938, the beneficiary intermarried with one Ray Earl Menefee, at Florence, Arizona. A few days after that date she advised petitioner and respondent of the fact and in evidence thereof delivered the latter certified copies of the marriage certificate, including the return of the person solemnizing the rites, and demanded of petitioner that it pay her the lump sum above set forth, in final settlement of the award. The matter was presented to respondent, which approved such settlement, and acting under this advice and the request of the beneficiary, the petitioner delivered to her a negotiable voucher, for a small balance then due her under the original award before her remarriage, and for the amount due as a lump sum after remarriage. This voucher showed on its face that it was made in full settlement of the award. On February 10, 1938, the voucher was endorsed by her, presented at the proper bank, and she received its full face amount.

Some five months later the beneficiary filed a complaint in the superior court of Maricopa County, praying for a divorce from Ray Earl Menefee on the ground of cruelty. About a month and a half later an amended complaint was filed in the same court and cause, seeking a decree of annulment instead of a decree of divorce. As grounds for her suit for annulment, she charged that Menefee was physically incompetent at the time of the marriage, and that such incompetence had continued up to the time of the commencement of her action; that before marriage he had assured her he was competent; and that she would not have entered into the contract except for his fraudulent statements and assurances. On the 8th of August, 1938, the trial court granted to her a decree of annulment of the marriage, which reads, so far as material, as follows:

"The Court, being duly advised in the premises, finds:

"That the allegations of the plaintiff's complaint, all and singular, are true; that the plaintiff is now and for more than one year last past has been an actual and bona fide resident of Maricopa County, State of Arizona; that the plaintiff and defendant entered into the contract of marriage and the marriage ceremony at Florence, Arizona, on the 20th day of January, 1938; that there is no issue of said marriage; that there is no community property of the parties hereto; that at the time of said marriage of plaintiff and defendant herein plaintiff was physically incompetent, and that said incompetency has continued to the time of the commencement of this action; that defendant induced said plaintiff to enter into said marriage contract by fraudulent statements and assurances regarding his physical competency; and that said marriage was fraudulent in its inception, and therefore null and void.

"Wherefore, it is ordered, adjudged and decreed: That the bonds of matrimony heretofore existing between plaintiff and defendant are hereby annulled, cancelled,

set aside and held to have been null and *void; and that said plaintiff be, and she is* hereby granted a decree annulling said marriage."

This decree was never appealed from, nor brought before this court for review, nor was there any attempt made to set it aside in any court of competent jurisdiction. Thereafter, and on September 8, 1938, the beneficiary applied to the respondent, tendering back to the petitioner herein the amount which she had received as lump settlement, as aforesaid, and asking that the settlement be set aside and that she be restored to her position under the original findings and award as it existed before her marriage to Menefee.

Petitioner protested most strenuously against the setting aside of the settlement and the reinstatement of the award, and the matter was heard before respondent. At the hearing an award was made reinstating the original award which required the monthly payments, as aforesaid, whereupon the matter was brought before us for review.

[1] Petitioner raises several interesting and novel questions of law for our consideration, and we deal with them in what we consider their logical order. The first is whether a widow to whom an award of monthly compensation is made, and who has received under our law a lump sum in settlement of the original award upon a remarriage, may have such original award reinstated upon tendering back the amount of the lump settlement, if the marriage has been annulled by a court of competent jurisdiction.

The question is a new one in this state. Nor have we been cited to many cases bearing thereon. The one nearest thereto in the factual situation is Eureka Block Coal Co. v. Wells, 83 Ind.App. 181, 147 N.E. 811, 812. Therein an award had been made, as in the present case, of monthly compensation, and the widow remarried. The marriage was afterwards annulled, and she claimed she was entitled to continued compensation as the widow of the original claimant. The court said: "Appellant points out that clause (e) of section 38 of the Workmen's Compensation Act (Acts 1919, p. 165), among other things, provides that 'the dependency of a widow * * * shall terminate with * * * her marriage subsequent to the death of the employé,' and with much earnestness contends that by reason of this provision of the act the marriage of appellee to McCormick, though voidable, nevertheless was a marriage which terminated absolutely and permanently the dependency of appellee as widow of James E. Wells. We do not concur in this view. Giving the provision referred to a broad and liberal construction, as we must, a marriage, within the meaning of the statute, is not a void or voidable marriage which may at once be annulled, but a valid and subsisting marriage."

The cases of Crummies Creek Coal Co. v. Napier, 246 Ky. 569, 55 S.W.2d 339, and Dodds v. Pittsburgh, M. & B. Rys. Co., 107 Pa.Super. 20, 162 A. 486, by inference adopt the same rule. While in both cases last cited, the court refused to restore the original award of compensation, the opinions show clearly that it was because the marriages in both cases had not been legally annulled, and the implication is that had they been, compensation would have been restored. We hold, therefore, that when a widow who is entitled to compensation under the Arizona law has remarried and received a lump settlement of the award, a legal annulment of the marriage will entitle her to have the original award reinstated upon tendering back the amount she has received as lump settlement.

[2, 3] The next question is whether the receipt of a lump settlement under the directions of the respondent, with the understanding on the part of all parties that such settlement was in full release and satisfaction of all claims, estops the widow from asking that the award be reinstated after an annulment of her marriage.

In the case of Eureka Block Coal Co. v. Wells, supra, which is the only one cited to us where the original award was reinstated after the annulment of the marriage, petitioner points out that the settlement therein was a transaction between the parties, not made pursuant to an order of the Industrial Board of Indiana, and urges that had it been made pursuant to the order of the board, the original award would not have been reinstated. We find nothing in the opinion which sustains this conclusion. Estoppel only exists when the party sought to be estopped, with full knowledge of all the facts bearing on the situation, takes a position which is inconsistent with one assumed later. In the present case, there was nothing except surmise to show that the beneficiary had any

knowledge at the time she made her settlement of the facts upon which she later based her suit for annulment. Under such circumstances, we think the acceptance of the lump settlement did not estop her from asking for a reinstatement of the original award.

This brings us to the question which was most strenuously urged by petitioner at the hearing. It contended, and still contends, that the marriage was not, under our law, subject to annulment for the cause set forth in the complaint, and that the trial court, therefore, had no jurisdiction of the matter. If this be true, then the judgment is void on its face and subject to collateral attack, and if there be no legal annulment nor a possibility thereof, the marriage is still subsisting and the lump settlement must necessarily stand.

[4–7] Marriage is almost universally said by the authorities to be a "civil contract", but this language is perhaps, strictly speaking, inaccurate. It may more [illegible] and based upon a civil contract. Hilton v. Roylance, 25 Utah 129, 69 P. 660, 58 L.R.A. 723, 95 Am.St.Rep. 821; 38 C.J. 1273 and cases cited. Since it is founded upon contract, the question of whether the status actually exists depends upon the rules governing the making of the contract. Two of the essentials of a valid contract are that the parties have capacity to enter into it, and that they actually consent thereto, and these principles apply to the contract upon which marriage is based. It, therefore, follows logically that if a marriage contract, though proper in form, is entered into by parties who have not the capacity to consent thereto, or who, for some reason or another, have consented in form but not in fact, the marriage contract may be set aside like any other one, on the ground that the essentials are lacking. A judicial proceeding wherein it is sought to establish that a marriage contract was lacking in some of its essentials is called an annulment proceeding as distinguished from one which admits the original validity of the marriage, but requests that the contract be declared breached by some conduct on the part of one of the spouses which is inconsistent with its terms. Annulment proceedings under the common law were, therefore, very generally based upon the equitable powers of chancery courts to give relief in respect to contracts generally in cases of fraud, mental incapacity, or want of consent generally. Mattison v. Mattison, 1 Strob.Eq. 387, 20 S.C.Eq. 387, 47 Am.Dec. 541; Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92, 95 Am.St.Rep. 609. Such proceedings, being based on a defect in the original contract, necessarily implied a holding that the contract never did actually become complete, while divorces assume the original binding effect of the contract, but cancel it for some breach of the conditions.

[8] In most of the states, however, there are statutes which specifically set forth the causes which will authorize an annulment of a marriage, and it is quite generally held that where a statute has declared jurisdiction in this respect the court will look to the statute as the measure and limit of its authority. Stierlen v. Stierlen, 6 Cal.App. 420, 92 P. 329; 38 C.J. 1349 and cases cited. The Arizona statute governing annulment is contained in sec. 2178, R.C. 1928, which is in this language: "[illegible] of marriage. The superior courts may dissolve a marriage, and may decree the marriage to be null and void, where the cause alleged shall be an impediment rendering such contract void."

It is urged by petitioner that under this section the only thing which will authorize a decree of annulment is one of the causes found in sec. 2166, R.C.1928. The section reads as follows: "*Prohibited and void marriages.* The marriage of persons of Caucasian blood, or their descendants, with Negroes, Mongolians or Indians, and their descendants, shall be null and void. The marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters, of the one-half as well as of the whole blood, and between uncles and nieces, aunts and nephews, and between first cousins are incestuous and void. Children born out of wedlock, or the relations thereof, are included within the prohibition."

[9–11] It is contended by the beneficiary, on the other hand, and this theory was adopted by respondent, that the word "void", being the last word of section 2178, supra, really means "voidable" and that her marriage was of that class.

Petitioner insists that the only marriage contracts which may be annulled are those which cannot, under any circumstances, become valid, while respondent claims that annulment applies not only to contracts of that nature, but to those which, though

lacking the vital element of consent, may be ratified by the subsequent action of the party who did not originally legally consent thereto. In the case of Kinney v. Lundy, 11 Ariz. 75, 89 P. 496, 498, we had occasion to discuss the meaning of the word "void" when found in an act of our legislature. Therein we said: "* * * Upon the meaning and construction to be placed upon this word 'void,' as here used, depends the determination of the question before us. In the strictest sense 'void' means that which has no force and effect. The Century Dictionary gives the following as its definition specifically, in law: 'Without legal efficacy; incapable of being enforced by law; having no legal or binding force.' * * * But the courts very generally have refused to accept this narrower, stricter construction as the one to be adopted as giving proper effect to the intent in the minds of the person or body making use of the word in legal documents or enactments, and have frequently construed it as used in effect in the sense of voidable only, rather than void, where such construction seems more nearly to conform to the probable intent in its use. * * *"

The court proceeds to quote from many cases to this effect, and then continues: "Many other decisions of like tenor might be cited, but the foregoing are sufficient to show that the courts generally recognize that it is the common practice of both legislatures and courts to make use of the word 'void' as interchangeable with, and as having the meaning of, 'voidable,' and with substantially the same force and effect; and that it is not only proper, but that it is the duty of a court to interpret the meaning of the word either strictly or more liberally as the intent shall appear. * * *"

To the same effect is the case of Yancy v. Jeffreys, 39 Ariz. 563, 8 P.2d 774. We must, therefore, determine whether our legislature, in section 2178, supra, meant to use the word "void" in its more restricted sense, which would cover only marriage contracts incapable of ratification, or whether it really meant the more liberal term of "voidable", which would include also those subject to ratification at the will of the injured party, and if the latter be the case, whether the legislature intended the marriage of the beneficiary to fall within the annulment statute.

Paragraph 2110 of the Revised Statutes of 1887 dealt with the subject of annulment in the following language: "The district court shall have power to hear and determine suits for the dissolution of marriage, *where the causes alleged therefor shall be natural or incurable impotency of the body at the time of entering into the marriage contract*, or any other impediment that renders such contract void, and shall have power and authority to decree the marriage to be null and void." (Italics ours).

Paragraph 2111 of the same statutes states the causes of divorce. Impotency on the part of either party was not given as one of them. In that year then it was the obvious intention of the legislature that impotency at the time of marriage should be a ground of annulment, but not of divorce. It is also plain that the legislature then did not intend to use the word "void" in the annulment statute in its strict sense, but rather meant "voidable", for physical incapacity for sexual intercourse usually does not render a marriage void, but voidable merely, and the marriage is regarded as valid until regularly dissolved at the suit of the party so wronged, but if he or herself wronged. Martin v. Otis, 233 Mass. 491, 124 N.E. 294, 6 A.L.R. 1340; Kaiser v. Kaiser, 16 Hun.N.Y., 602; Briggs v. Morgan, 3 Phill. 325, 161 Eng. Rep. 1339; Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L.R.A.1916C, 693.

Had the law remained as it was in 1887, there could be no question that the legislature meant to make any voidable marriage subject to annulment, and that it recognized physical impotency as a proper ground for such a proceeding, and not for a divorce. In 1901, however, it again considered the subject, and substituted for paragraphs 2110 and 2111, supra, paragraphs 3112 and 3113, of the Revised Statutes of 1901, the first dealing with annulment, and the second with divorce. It continued in effect the exact language of paragraph 2110, supra, with the exception that it removed therefrom the phrase "where the causes alleged therefor shall be natural or incurable impotency of the body at the time of entering into the marriage contract", and placed in paragraph 3113, which gives the grounds for divorce and not for annulment, the following clause, being subdiv. 2 of the paragraph: "When one of the parties was physically incompetent at the time of marriage and the same has continued to the time of the commencement of the suit."

The language of the statutes of 1901 in regard to annulment and divorce, in so far

as these matters are concerned, is identical with that of the code of 1928. We think it is clear that the legislature used the word "void" in our annulment statute as referring to marriages which were subject to ratification or disaffirmance by the injured party, as well as those which could not be ratified, including specifically in 1887, as a ground for annulment, marriages of the class to which that of the beneficiary belongs, but that in 1901 it determined, for reasons best known to itself, that physical impotency should no longer be a ground for annulment, but rather for divorce.

[12, 13] We hold, therefore, that it is now the law that while all other forms of voidable marriages are subject to annulment, physical incompetency existing at the time of the marriage and continuing to the time of suit is not a ground of annulment, but of divorce only. As to what reasons the legislature had for this change, we cannot say, but it is very evident that this was its intention, and the intent of the legislature must govern. Such being the case, the cause upon which the beneficiary herein secured an annulment of her marriage was not one authorized by law, and the court, of course, had no jurisdiction to render such a judgment. It necessarily follows that the beneficiary is still the wife of Ray Earl Menefee, and is not entitled to set aside the lump settlement which was made by her with the full knowledge and approval of all the parties, including the respondent herein.

The award is set aside and the case remanded for further action.

ROSS, C. J., and McALISTER, J., concur.

STATE et al. v. ANGLE.

No. 4078.

Supreme Court of Arizona.

June 19, 1939.

1. Pleading ⇐214(1)

Demurrers admit substantial allegations of complaint.

2. Master and servant ⇐69

Capitol gardeners, janitors, watchmen, and engineer were engaged in "mechanical" or "manual labor" within protection of minimum wage law, notwithstanding that their tenure and total annual compensation were not uncertain or fluctuating. Rev.Code 1928, § 1350, as amended by Laws 1933, c. 12, § 1.

[Ed. Note.—For other definitions of "Manual Labor" and "Mechanical Labor," see Words & Phrases.]

3. Master and servant ⇐69

Whether workman is engaged in "mechanical" or "manual labor" within minimum wage law depends on generally accepted character of any given type of work, and not on whether labor performed by particular individual has all the usual conditions of the type, and it is the general custom and not the particular instance which determines the classification. Rev.Code 1928, § 1350, as amended by Laws 1933, c. 12, § 1.

4. States ⇐132

The principal purpose of financial code of 1922 was to prevent the incurring of any indebtedness in excess of the amount appropriated by the Legislature. Laws 1922, c. 35.

5. Statutes ⇐159

A later valid act of Legislature supersedes all previous acts with which it is in conflict, whether or not it expressly repeals the earlier provisions.

6. States ⇐131

A "general appropriation bill" can contain nothing but the appropriation of money for specific purposes, and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only, and any attempt at any other legislation in the bill is void.

[Ed. Note.—For other definitions of "Appropriation Bill," see Words & Phrases.]

7. States ⇐131

An attempt in a general appropriation bill to repeal prior general legislation is invalid.

8. States ⇐132

A provision in the financial code prohibiting state indebtedness in excess of money appropriated unless expressly authorized by law was superseded by subsequently enacted general legislation fixing minimum wages for manual or mechanical labor, in so far as the two were in conflict. Rev.Code 1928, § 2618, and § 1350, as amended by Laws 1933, c. 12, § 1.

9. States ⇐132

A provision in the minimum wage law requiring that certain wages be paid for

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BOYD A. WARD,

Plaintiff,

-vs-

RICHFIELD CITY, a municipal corporation; RICHFIELD CITY COUNCIL, a political subdivision of the State of Utah; KENDRICK HARWARD, individually and in his official capacity as Mayor of the Richfield City Council; GLEN OGDEN, individually and in his official capacity as a member of the Richfield City Council; KAY KIMBALL, individually and in his official capacity as a member of the Richfield City Council; REX WARENSKI, individually and in his official capacity as a member of the Richfield City Council; DUANE WILSON, individually and in his official capacity as a member of the Richfield City Council; NAD BROWN, individually and in his official capacity as a member of the Richfield City Council; WOODY FARNSWORTH, individually and in his official capacity as a member of the Richfield City Council; and DOES I through V,

Defendants.

MEMORANDUM DECISION AND ORDER

Civil No: C-82-0467W

Plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment were orally argued on May 20, 1983. The plaintiff was represented by George E. Brown, Jr.

The defendants were represented by Ken Chamberlain and Richard Chamberlain. Following the hearing, the court took the matter under advisement and has since reviewed the memoranda of counsel and various of the cited authorities. Based on the foregoing, the court renders the following decision.

Plaintiff in this case is seeking partial summary judgment on the first, second and third claims for relief in his complaint, which arise from his termination as chief of police of Richfield City in April 1981. Because of perceived violations of Utah's Open and Public Meetings Act, plaintiff sought to void the city's council's action relating to his termination. The state district court ultimately declined to grant plaintiff's requested relief because of § 10-3-911 U.C.A. which allows for removal of a chief of police without cause.[1] Plaintiff contends this statute does not pertain to a city of the third class, such as Richfield City. Plaintiff has further argued that his civil rights were violated under color of state law as a result of the manner in

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[1] Section 10-3-911 U.C.A. provides:

> Removal of department heads. The chief of police or fire department of the cities may at any time be removed, without a trial, hearing or opportunity to be heard, by the board of commissioners whenever in its opinion the good of the service will be served thereby. Its action in removing the chief of either department shall be final and conclusive and shall not be reviewed or called in question before any court. The city recorder shall forthwith notify in writing the removed chief of his removal, and it shall not be necessary to state any cause for removal. From the time of notification the person removed shall not in any case be entitled to any salary or compensation.

which the Richfield City Council terminated him and by the complicating factor that the Utah state district court did not find it had jurisdiction to question the procedural manner in which the city council conducted its business in releasing the plaintiff.

The defendants have moved for summary judgment on the four claims for relief in the plaintiff's complaint. The defendants essentially contend that federal courts are not to redress violations of state laws under the Civil Rights Act, that plaintiff has suffered no constitutional deprivation of property or liberty, and that no actionable conspiracy exists.

Looking to the plaintiff's contentions, it is apparent the plaintiff's principal claim is that the defendants have violated procedural safeguards in Utah's Open and Public Meetings Act in the process of terminating the plaintiff as chief of police. While this court finds a question of fact exists as to whether the Utah Public Meetings Act was violated, there is no question that federal courts will not, under the Civil Rights Act, redress violations of state laws. The Open Meetings law establishes a state and not a federal interdiction. See e.g. Snowden v. Hughes, 321 U.S. 1, 11 (1944) (mere violation of a state statute does not infringe upon the federal constitution); Atencio v. Board of Education, 658 F.2d 774 (10th Cir. 1981) (a breach of state procedural requirements is not, in and of itself, a violation of the due process clause; an action under the civil

rights statutes is not a plenary review of a challenged state administrative procedure); Ybarra v. Barton, 647 F.2d 891 (9th Cir. 1981) (state statute requiring hearing did not constitute sufficient predicate under 42 U.S.C. § 1983 due to lack of property or liberty interest); and Dorsey v. NAACP, 408 F.2d 1022 (5th Cir. 1969) (where rights are derived solely from state law, their deprivation is not subject to a claim under 42 U.S.C. § 1983). Because this court finds it is without jurisdiction to entertain plaintiff's claims that state procedural safeguards were violated, a dispute as to exactly what procedure was followed by the city council does not preclude granting summary judgment on this issue.

Plaintiff next maintains he has been deprived of certain constitutional rights because of his release or circumstances surrounding his release. Plaintiff contends not only that he had tenure, but that because he was terminated in such an unusual manner, an assumption is created that the plaintiff had committed an inappropriate act, since the city council consistently indicated the plaintiff had been a good administrator, but dismissed him for "internal problems" in the police department. As a result, plaintiff asserts he has been unable to procure employment as a chief of police in other Utah communities, though he apparently has been elected as constable for Sevier County.

To ascertain whether the plaintiff has been deprived of a constitutional right under the facts of this case, the court must find the city council's actions affected a property right or a liberty interest of the plaintiff. Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564, 569-71, 577 (1972). Examining the property interest first, plaintiff contends he had tenure until the next election under § 10-3-916 which provides:

> In each city of the third class and in each town on or before the first Monday following a municipal election the Mayor, with the advice and consent of the City Council, shall appoint a qualified person to each of the offices of city recorder, treasurer and marshal.

This court cannot agree with the plaintiff's reading of the statute. As applied to the present facts the quoted section only empowers a mayor to appoint a marshal, though this court does agree with the plaintiff's contention that the legislature has not clearly set out the process by which a marshal or chief of police of a third class city is discharged.

The defendant contends § 10-3-911 is the appropriate section for the release of a third class city's chief of police. Plaintiff argues that section only pertains to first and second class cities. While there is some indication the section can

only apply to first and second class cities,[2] this court also notes that the use of the term "board of commissioners," rather than "governing body," may have been inadvertent, as the surrounding sections appear to be rather inartfully drawn.

This court finds helpful the Utah Supreme Court's tangential look at § 10-3-911 in State v. Stavar, 578 P.2d 847 (Utah 1978). Although it is not clear the court knew Helper, Utah, was a third class city, it is apparent the Utah Supreme Court had no reservations in indiscriminately applying § 10-3-911. Id. at 848. See also, id., at 849 (Wilkins, J., concurring). This is understandable in light of prior provisions covering removal of a chief of police. Since 1933 cities of the third class or any city, for that matter, have been able to remove the head of their police force without cause. Taylor v. Gunderson, 154 P.2d 653, 107 Utah 437 (1944). There is nothing in the 1977 revision of the Utah Municipal Code to indicate to this court the legislature's intent has changed. Thus, under the law of Utah, this court does not find the plaintiff had a property interest in continued employment. As it is this court's opinion plaintiff's position as chief of police was terminable at will, without cause, plaintiff did not have a property interest

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2 The term "board of commissioners" is defined by the Utah Municipal Code as being part of the governing body of first and second class cities; "city council" is used for a third class city. See §§ 10-1-104(2) and (b); 10-3-103,-104,-105.

in continued employment and no constitutional deprivation could have occurred. See Bishop v. Wood, supra; Board of Regents v. Roth, supra.

This court must also determine whether the plaintiff has been deprived of a liberty interest. It is undisputed that the following news release was formulated by the city council upon the termination of the plaintiff:

> In a meeting between the Richfield City Chief of Police and the Richfield City Council on Thursday, April 2, 1981, Boyd Ward, Richfield City Chief of Police, was relieved of duty effective April 3, 1981. It was felt by the Mayor and the Council that internal problems in the department made this change necessary.

The plaintiff also refers this court to a newspaper article which appeared in the Deseret News April 4, 1981. The article reads in pertinent part:

> RICHFIELD - Richfield Police Chief Boyd Ward has been relieved of his post by the city Council.
>
> Mayor Kendrick Harwood was not available for comment Friday, but a Councilman said there had been internal problems in the police department along with criticism and letters to the editor in a local newspaper that led to the firing.
>
> . . .
>
> The councilman praised Ward for his administration (sic) ability and "building a fine police department," however.
>
> . . .
>
> Ward declined comment on his firing.

The statement about the plaintiff being terminated for internal problems in the interview with a council member has, according to the plaintiff, caused significant damage in that the plaintiff has been unable to refute the accusation against him in order to find a new position as chief of police in another community. This court is aware that the Supreme Court held in Owen v. City of Independence, 445 U.S. 622 (1980), that the dismissal of a chief of police accompanied by charges that might damage his reputation, without the benefit of a hearing, amounts to a deprivation of liberty without due process of law. Looking to the undisputed facts of this case, however, it is clear to this court that this is not a case where the plaintiff's interests in liberty have been implicated. The council did not relieve him of his position as chief of police on a charge that he had been guilty of dishonesty or immorality, nor does this court see any indication whatever that the plaintiff's good name, reputation, honor or integrity is at stake. See Board of Regents v. Roth, 408 U.S. at 573. [redacted] the plaintiff to be true, under the Standards explained by the Supreme Court this court finds no liberty interest infringement arising from the actions of the city council.

It follows that if there has been no deprivation of property rights or liberty interests, there can be no actionable conspiracy. It is axiomatic that there can be no cause of action

for conspiracy under the Civil Rights Act where the acts complained of, and the means employed in doing the acts, are lawful. See e.g., 16 Am. Jur.2d, Conspiracy § 49.

In accordance with the above discussion, plaintiff's motion for partial summary judgment is denied and the defendants' motion for summary judgment is granted.

Dated this 11th day of July, 1983.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 11th day of July, 1983.

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